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Coulter and Smith, LTD. v. Roger Russell, Roger Richards, Kristen Russell : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

COULTER & SMITH, LTD., a Nevada corporation, Appellant, vs. ROGER RUSSELL, ROGER RICHARDS, and KRISTEN RUSSELL, Appellees.	**APPELLANT'S REPLY BRIEF** Case No. 950726-CA Priority No. 15

APPEAL FROM FINAL JUDGMENT OF THIRD DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

TABLE OF AUTHORITIES CONT'D.

CASE LAW

TABLE OF AUTHORITIES CONT'D

CASE LAW

STATUTES

RULES

TREATISES

ARGUMENT

I. THE STATUTE OF FRAUDS DOES NOT APPLY TO BAR ENFORCEMENT OF THIS CONTRACT.

This is a case where there is no evidence of fraud, and indeed, no possible allegation of fraud. The evidence of record is undisputed that the parties intended that the Agreement cover the entire 3.67-Acre Parcel. (R. 454, Finding of Fact No. 1). The evidence of record is undisputed that the parties had agreed that the price for the 3.67-Acre Parcel would be determined by a clearly established method. (See infra, pps. 4-6). Despite this undisputed evidence, Russell is attempting to use the Statute of Frauds as a shield *to breach his contract without consequences*. The purpose of the Statute of Frauds is not to allow one to avoid admitted and undisputed obligations. As has been stated by this Court:

> We note that the purpose of the statute of frauds is that in important matters [involving transfers of real property] the parties should be protected against frauds and perjuries. (citations omitted). *It is not to prevent the performance or the enforcement of oral contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators*. Therefore, we should always be satisfied with "some note or memorandum" that is adequate, when considered with the admitted facts, the surrounding circumstances and all . . . evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. (citations omitted)

English v. Standard Optical Co., 814 P.2d 613, 616 (Utah App. 1991). When the existence of the contract has been admitted, the statute of frauds is waived. Bentley v. Potter, 694 P.2d 617 (Utah 1984).

The property to be sold by the contract at issue in this case is not in question. The method for determining the price to be paid is not uncertain. The Statute of Frauds was

simply not designed to allow Russell to escape his undisputed contractual obligations.

A. WHAT PROPERTY WAS TO BE SOLD BY THE AGREEMENT IS NOT IN QUESTION.

In the face of substantial Utah authority, Russell has conceded that parol evidence is admissible to clarify *what* property was to meant to be described in a written agreement for the sale of real property. (Russell's Brief, p. 14). This concession is consistent with the trial court's Finding of Fact No. 1 (R. 454) and Russell's own admissions throughout this litigation that the real property that is the subject of the Agreement between the parties is the 3.67-Acre Parcel.

Russell goes on, however, ignoring his own admissions and the trial court's factual findings, to assert that parol evidence of a collateral agreement is not admissible to prove *how* the parties decided to describe the real property. (Russell's Brief, pps. 14-16). In presumed support of that proposition, Russell has cited to three cases, Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026, (1973); Vasels v. LoGuidice, 740 P.2d 1375 (Utah App. 1987); and Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967). The first two of these cases do not support Russell's position, and the third case actually contradicts Russell's proposition. The Davison and Vasels courts rejected the written contracts in those cases, not because of collateral agreements that the parties had already made, but because the final legal description (in both cases) was contingent upon *future* agreement between the parties. In Pitcher, however, the contract was rejected because the extrinsic evidence showed that, contrary to the statements in the written contract, no collateral agreement *had* been made. The written language of the Pitcher contract had provided for the sale of 30 acres of 189 acres owned by seller "as indicated by map." No map was ever shown to the buyer, a fact the Pitcher court could only have

determined based on parol evidence. With no evidence of any collateral agreement as to what map would govern the sales contract, the Pitcher court rejected the sales contract as unenforceable. It follows that had parol evidence shown that the parties *had* agreed upon a governing map, the contract would have been upheld. Thus, contrary to Russell's position, Utah law does allow parol evidence of collateral agreements to be introduced to prove *how* the parties decided to describe the real property.

But proof of a collateral agreement as to how the parties intended to describe the real property is not necessary in this case, for there simply is no dispute that the Agreement was intended to cover the entire 3.67-Acre Parcel. The statute of frauds is a defense that is waived by an admission of the existence of the contract. Bentley v. Potter, supra. The trial court's Finding of Fact No. 1 (R. 454) found that the entire 3.67-Acre Parcel was covered by the Agreement, and Russell has conceded such throughout this litigation. (See, e.g., R. 124, ¶6). *All* of the lots on the 3.67-Acre Parcel were subject to Coulter & Smith's option to purchase. (See footnote 3, Coulter & Smith's Brief). Any collateral agreement between Coulter & Smith and Russell regarding the number (and size) of lots to be developed on the 3.67-Acre Parcel is irrelevant to a determination of what property was the subject of the Agreement. The *entire* 3.67-Acre Parcel was subject to the Agreement. Where, as here, there is no dispute as to what property is to be transferred, the Statute of Frauds cannot apply to attempt to avoid the Agreement.[1]

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[1] Without citing to any authority that it makes a difference, Russell attempts to make much of the fact that the *size* of the lots had not yet been determined at the time the Agreement was made. But the size of the lots is irrelevant, for it is undisputed that Coulter & Smith had an option to purchase the entire 3.67-Acre Parcel, including *all* of the lots developed thereon, regardless of their size. While Russell has attempted to distinguish Bellevue College v. Greater

B. THE METHOD FOR DETERMINING THE PRICE TO BE PAID FOR THE PROPERTY IS NOT UNCERTAIN.

The only term not contained in the Agreement between Coulter & Smith and Russell was the exact number of lots that would eventually be developed on the 3.67-Acre Parcel. Ignoring the agreement between the parties that the number of lots would be the maximum allowable by law, Russell argues that the Statute of Frauds has been violated because the contingency as to how many lots would eventually be developed renders the price to be paid for the 3.67-Acres uncertain. (Russell Brief, pp. 16-17).

Russell's argument fails because the parties had undisputedly agreed that the total price to be paid was contingent on what zoning Sandy City would eventually approve. The parties' agreement as to price is implied in the language of the Agreement that annexation and zoning was required in order for the lots to be developed. By implication, once zoning approval was obtained, the number of lots to be developed, and thus the price to be paid, could be established. See, English v. Standard Optical Co., supra, (essential element of rental amount can be determined by implication). Once Sandy City's zoning decision is made and the approved number of lots is established, the total purchase price for the 3.67-Acre Parcel is easily

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Omaha Realty Co., 217 Neb. 183, 348 N.W.2d 837 (1987) on this basis, the distinction is without a difference. In Bellevue, the court was able to determine the location of the disputed lot from examining preliminary plats (and, incidently, by relying on extrinsic evidence outside of the parties' written agreement). But the location of the lots subject to the parties' Agreement in this case is unquestioned -- all of the lots were to be located on the 3.67-Acre Parcel. Examination of a preliminary plat to determine the location is completely unnecessary. Moreover, the option was to purchase a parcel of real estate, not etchings on a plat mat. The 3.67-Acre Parcel remained the same, regardless of the number and/or size of the lots. Cf., Bitzes v. Sunset Oaks, Inc., 649 P.2d 66 (Utah 1982) (specific performance to purchase lot would be allowed even if final size and configuration of lot differed somewhat from parties' original agreement).

calculated; $26,500.00 times the number of lots developed. When a contract sets forth a cognizable formula by which the agreed purchase price can be readily ascertained, there is no violation of the Statute of Frauds. Dahm v. Miele, 523 N.Y.S.2d 851, 853 (1988); Cage Realty, Inc. v. Hanna, 881 S.W.2d 254, 255 (Mo. 1994). And providing that a third party be the gauge by which the price is established is permissible as a matter of law. Jacobsen v. Cox, 115 Utah 102, 116; 202 P.2d 714, 722 (Utah 1949).[2]

Moreover, the material term of price is no more sacred a term than the material term of an adequate legal description. As Russell has conceded, parol evidence is admissible to prove what property was to meant to be described in a written agreement for the sale of real property. Similarly, parol evidence is admissible to prove the price if the written agreement is ambiguous. In the case before this Court, the unrebutted testimony of Coulter & Smith was that the parties had agreed they would seek the maximum number of lots from governmental authorities, hoping that they could develop eight to ten lots. (R. 217-19, ¶5, R. 344, ¶10). The Agreement provides that Coulter & Smith would pay $26,500.00 per lot, and that the parties would "[work] in concert" to facilitate zoning and other development concerns. Coulter & Smith had an option to buy *all* of the lots, not just some of the lots. (Footnote 3, Coulter & Smith's Brief). The parol evidence unequivocally establishes that the price to be paid for the

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[2] Moore & Associates Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367 (Colo.App. 1994), cited by Russell on p. 17 of his Brief, is inapposite. In that case, there was no evidence that the parties had agreed on a mechanism by which they or a third party would determine the number of condominium units to be built. In the absence of such an agreement, it is apparent that the total purchase price could not be determined. In the case before this court, however, since Coulter & Smith's and Russell's agreement as to how the price was to be determined *can* be found within the Agreement's provision that zoning was first required. Thus, the total purchase price to be paid can be readily ascertained.

3.67-Acre Parcel was $26,500.00 times the number of lots that would eventually be approved. Thus, the price to be paid by Coulter & Smith to Russell, being completely capable of determination, does not violate the Statute of Frauds.

Finally, there simply was no dispute between these parties about how the price was to be determined. Russell introduced nothing to counter Coulter & Smith's evidence on this issue. As set forth above, the purpose of the Statute of Frauds is to protect parties from fraud and perjury. It is not prevent enforcement of an admitted contract where there is no "serious possibility of consummating a fraud by enforcement." English v. Standard Optical Co., supra at 616. The Statute of Frauds is not designed to "create a loophole of escape for dishonest repudiators." Id. Here, where there are no possible allegations of fraud, and there is no evidence of fraud, Russell cannot use the Statute of Frauds to breach his contract without consequences.

C. COULTER & SMITH'S PART PERFORMANCE OF THE AGREEMENT ESTOPS RUSSELL FROM RELYING ON THE STATUTE OF FRAUDS.

In a further effort to avoid performance of his contractual obligations, Russell denies that the work Coulter & Smith performed in developing the 3.67-Acre Parcel constitutes sufficient part performance to take the Agreement out of the Statute of Frauds. (Russell Brief, pps. 18-24). Russell's argument is based on Coleman v. Dillman, 624 P.2d 713 (Utah 1981), which court held that *when part performance is predicated on possession*, the purchaser must prove (1) actual possession with the seller's consent; (2) beneficial improvements to the land; (3) consideration; and (4) that all of the foregoing were exclusively referable to the oral contract. Id. at 715. Russell's argument is misplaced, however, for Coulter & Smith has not predicated

its part performance on *possession* of the land. Instead, Coulter & Smith's part performance was of the Agreement's requirements that it develop the 3.67-Acre Parcel.

Specific performance based on part performance does not require that the buyer take possession of the land. For example, in LeGrand Johnson Corp. v. Peterson, 26 Utah 2d 158, 486 P.2d 1040 (1971), the buyer had advanced $44,000.00 toward development of the real property interest that was the subject of the parties' oral agreement to convey. The Utah Supreme Court upheld the trial court's finding that the advancement of the funds toward development was "sufficient part performance of the oral contract to remove it from the bar of the statute." Id. at 1041. In Baldwin v. Vantage Corp., 676 P.2d 413, 417 (Utah 1984), part performance of an oral contract for conveyance of seven lots was sufficient to remove the contract from the statute of frauds where the buyer had already fully paid for and received conveyances of three of the lots. And in Brinton v. Van Cott, 8 Utah 480, 33 P. 218 (1893), the buyer's sacrifice of her plans of future independence and continued performance of service was deemed to be sufficient part performance to remove the oral contract from Statute of Frauds. In none of these cases did any of the buyers take possession of the disputed land. Instead, the buyers' part performance of their obligations under the contracts was sufficient to remove these oral contracts from the Statute of Frauds.

Russell's argument that Coulter & Smith's development efforts were not "exclusively referable" to the Agreement must also fail. The Utah Supreme Court has held:

> . . . where the existence of the oral contract is established by an admission of the party resisting specific performance or by competent evidence independent of the acts of part performance, the requirement that the acts of part performance must be exclusive[ly] referable to the oral contract is satisfied. . (citing Jones v. Jones, 333 Mo. 428, 63 S.W.2d 146, 90 A.L.R. 219, [1933] Higgins v. Exchange Nat'l

> Bank, 142 Misc. 69, 253 N.Y.S. 859 [1931]). Corbin on Contracts, sec. 430, approves the holding of those cases.

In re: Roth's Estate, 269 P.2d 278, 281 (Utah 1954). The Roth Court explained that the reason for the exclusive referability requirement is to show that there was a reliance on the contract with a concomitant change of position, which would give rise to an estoppel. Id. If the party seeking protection under the Statute of Frauds admits the contract, there is no need of proof that the acts are exclusively referable.

In the case before this Court, Russell does not deny that there was an agreement between the parties that Coulter & Smith develop the 3.67-Acres and then purchase the lots that it had developed. Indeed, Russell frankly admits that the Agreement memorializes Coulter & Smith's agreement to develop the property and then purchase the lots:

> 4. On April 27, 1991, I met with [Coulter & Smith] *to discuss proposals of Coulter & Smith to develop and purchase the Property*.
>
> 5. At the meeting, I signed a letter prepared by [Coulter & Smith] *memorializing my offer to sell Coulter & Smith subdivision lots to be developed on the Property*.
>
> 6. At the meeting, *[Coulter & Smith] agreed and promised that Coulter & Smith would develop the Property into subdivided lots and purchase those lots* pursuant to the Purported Option by Spring 1992.
>
> 7. *Several times subsequent to [April 27, 1991] and Spring 1992, [Coulter & Smith] reaffirmed to me that Coulter & Smith would subdivide the Property and purchase the lots* by Spring 1992.

(R. 70; Affidavit of Roger Russell, ¶¶4-7) (emphasis added). On the basis of Russell's admissions, Coulter & Smith's development activities need not be proven to be exclusively referable to the Agreement.

Moreover, there was substantial and undisputed evidence that Coulter & Smith undertook substantial development activities that *were* exclusively referable to the Agreement. Coulter & Smith's evidence was that, on the basis of the Agreement alone, it had its engineers redesign the entire subdivision and storm drain systems to accommodate incorporation of the 3.67-Acre Parcel into the subdivision. (R. 218-19, ¶9; R. 345, ¶12). Coulter & Smith's costs to re-engineer, deepen and enlarge the sewer and storm drainage systems, solely to accommodate development of the 3.67-Acre Parcel, were in excess of $35,000.00 (R. 345, ¶12).[3] Coulter & Smith's negotiations with Sandy City and the neighbors resulted in resolution of access problems to the 3.67-Acre Parcel. (R. 219, ¶10). And the undisputed evidence was that Coulter & Smith would have undertaken none of these activities in the absence of the Agreement. (R. 219, ¶9; R. 345, ¶12). Thus, Coulter & Smith's activities constituted sufficient part performance to take the Agreement out of the Statute of Frauds. In re: Roth's Estate, supra.

Finally, as was observed by the Utah Supreme Court in Jacobson v. Cox, supra at 113, 714, the Statute of Frauds ". . . should be used for the purpose of preventing fraud, and not as a shield by which fraud can be perpetrated." When the advantages of an agreement are accepted, one cannot use the Statute of Frauds to escape the agreement's disadvantages. Id. at 117-18, 723. Here, the undisputed evidence was that in any future development of the 3.67-

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[3] Russell has correctly pointed out an error that counsel made in Coulter & Smith's Brief at p. 27. In fact, Coulter & Smith expended more than $35,000.00 to the sanitary and storm drainage systems in reliance on the Agreement, rather than the $50,000.00 figure cited by counsel on that page in the Brief. At R. 219, ¶11, Mr. Coulter attested that Coulter & Smith had spent more than $50,000.00 on the storm drainage system. Of that $50,000.00, Coulter & Smith expended an extra $35,000.00 in reliance on the Agreement ($15,000.00 to redesign and deepen the system, and $20,000.00 in enlarging the line and installing portions deeper). (R. 345, ¶12). Coulter & Smith's counsel apologizes for the error in the Brief.

Acre. Russell will not only be allowed, but will be required by Sandy City to utilize the storm drainage and sewer systems that Coulter & Smith installed pursuant to its obligations under the Agreement. (R. 345-46, ¶13). While Russell argues that he has paid for these improvements by way of the Three-Way Work Exchange Agreement (Russell's Brief, p. 22), Coulter & Smith has denied that the amount paid by Russell under the Three-Way Work Exchange Agreement was sufficient to reimburse Coulter & Smith for the extra costs required to develop the 3.67-Acre Parcel. (R. 345, ¶12). If Russell contends that he fully paid for the benefits he received from Coulter & Smith, then this raises an obvious factual dispute that requires resolution. Resolution of the dispute in Coulter & Smith's favor would estop Russell from raising the Statute of Frauds as a defense to enforcement of the Agreement. In re Roth's Estate, supra. Thus, the trial court's apparent resolution of this issue in Russell's favor must be vacated, and the issue remanded for trial.

In further effort to avoid performance of his contractual obligations, Russell has advanced a proposition which, if it were to be accepted, would throw out an entire body of Utah law that allows oral contracts for the sale of real property to be proven under theories of equitable estoppel and/or part performance. Russell's theory, based on a case from the State of Washington, is that a contract that fails under the Statute of Frauds can be proven only by a performance which "evidences the terms of the parties' agreement that should have been in writing. . . ." (Russell's Brief, p. 23). This theory is not law in the State of Utah.

Cited by Russell in his brief at p. 23, the case of Berg v. Ting, 125 Wash.2d 544, 886 P.2d 564 (1995) struck down an agreement whereby the plaintiffs, in reliance on the defendants' agreement to convey an easement, withdrew their opposition to the defendants'

proposed development plans. Though there were no allegations of fraud involved in Berg, the Berg court held that the agreement was barred by the Statute of Frauds, despite the fact that the plaintiffs had already performed their end of the bargain. The Berg court found that the Statute of Frauds prevented enforcement of the agreement because the plaintiff's partial performance "reveal[ed] nothing about the character or terms of any contract." This would not have been the result had a Utah court construed this contract.

In Utah, even oral contracts for the sale of real property, in which *none* of the material terms are in writing, can be proven by part performance. This proposition is grounded in statute:

> Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

U.C.A. §25-5-8 (1953, as amended)

This statute has been construed by the Utah Supreme Court as follows:

> The doctrine of part performance in this State has not been confined to a fixed, inflexible formula. In Holmgren Brothers, Inc. v. Ballard, Utah, 534 P.2d 611 (1985), the Court stated:
>
> > The doctrine of part performance, in the state of Utah has not been reduced to a formula, as it has in some of our sister states. Thus, decisions of this court do not stay the hand of equity in the equitable situations created by oral contracts for the transfer of an interest in land, but the statute is preserved and remains to serve its purpose -- the prevention of fraud and injustice.
>
> Id. at 613-14.

Young v. Moore, 663 P.2d 78, 80 (Utah 1983).

In Young, the parties had come to a agreement whereby they would exchange parcels of real property in order to settle a quiet title lawsuit brought because of conflicting legal

descriptions. Prior to execution of the written agreement, Moore proceeded with construction of a garage on Young's property. Thereafter, Young refused to sign the settlement agreement or to convey the property to Moore. Despite the fact that *none* of the terms of the oral contract were in writing, including the property description, the time for conveyance, the consideration to be paid, the Utah Supreme Court upheld specific enforcement of the oral agreement, finding that the improvements that Moore had made to the property after the oral agreement were sufficient part performance to specifically enforce the settlement agreement. Notably, nothing about Moore's improvements revealed what the consideration had been for the conveyance by Young to Moore. And nothing about Moore's improvements served to establish the boundaries of the property to which he claimed entitlement under the oral contract. While specific performance of the Young contract would have been denied in Washington under Berg principles, it was upheld in Utah, despite the fact that these critical provisions of consideration and legal description could not be proven by Moore's part performance. There was no fraud, and there were no allegations of fraud in Young. In the absence of fraud, the hand of equity in Utah is not stayed.

D. THE STATUTE OF FRAUDS CANNOT SERVE TO DEFEAT AN AGREEMENT THE EXISTENCE OF WHICH IS UNDISPUTED.

Nor was there fraud in the case at bar, or any possible allegations of fraud. When there is no dispute between the parties as to what property was to be transferred and how the price was to be determined, the Statute of Frauds is inapplicable. In this case, it is an admitted fact, and a finding by the trial court, that the Agreement covered the 3.67-Acre Parcel. (R. 454, Finding of Fact No. 1). It is an undisputed fact that the price to be paid for the 3.67-Acre

Parcel was $26,500 times the number of lots approved by Sandy City. Russell knows these terms, Coulter & Smith knows these terms, and those were the terms of the Agreement.[4]

As explained above, the Statute of Frauds is not designed to prevent the enforcement of oral contracts that have in fact been made. It is not designed to "create a loophole of escape for dishonest repudiators." English v. Standard Optical Co., supra at 616. Russell may not avoid his contractual obligations by use of the Statute of Frauds.

II. THE RULE AGAINST PERPETUITIES DOES NOT BAR ENFORCEMENT OF THE AGREEMENT.

In urging that the rule against perpetuities has been violated, Russell has disregarded the inherent inconsistency in his own argument and in the trial court's ruling. If, as Russell contends, any exercise of the option rights in the Agreement after the Spring of 1992 was beyond a reasonable time, (Russell Brief, p. 31, footnote 12), or if, as the trial court found, a reasonable time had passed as of January 1995 (R. 456, Conclusion of Law No. 4), then the rule against perpetuities cannot have been violated. Both of these periods (i.e., from 1991 to

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[4] Russell has raised two new issues on appeal by arguing that there was no meeting of the minds as to who bore the risk in the event Sandy City adopted unfavorable zoning (Russell Brief, pps. 26-27), or alternatively, that the Agreement was based on a mutual mistake that zoning could be manipulated (Russell Brief, p. 27, footnote 9). Russell has not pointed to any fact that existed at the time of the parties' agreement as to which they were mistaken. Indeed, the evidence was clear that the parties *knew* they had no ultimate control over Sandy City's final decision, a fact that Russell has admitted at page 26, footnote 8, of his Brief. Furthermore, Russell's argument ignores the risk that Coulter & Smith also undertook by agreeing to the contingency of Sandy City's zoning decision. Coulter & Smith's development costs would remain substantially the same, regardless of how many lots were eventually approved. Because the issue was not raised below, neither party presented any evidence and no facts were developed as to whether the parties had discussed this contingency prior to making their agreement. Russell is now prohibited from making these arguments on appeal. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356 (Utah Ct. App. 1991) (appellate courts will not consider arguments that were not raised before the trial court).

the Spring of 1992, or from 1991 to January 1995) are well within the perpetuities period. Thus, *there cannot have been any violation of the rule.*

Russell also ignores the development of Utah law that affects this issue, and then mischaracterizes Coulter & Smith's arguments (Russell Brief, p. 29, footnote 10), in his efforts to apply the rule against perpetuities (Russell Brief, pp. 29-31). Coulter & Smith does not contend that the Utah appellate courts have recently directly addressed the rule against perpetuities. Instead, Coulter & Smith notes that in recent years, Utah appellate courts have *disregarded* the rule against perpetuities and have gone on to uphold contracts for the transfer of real property interests, despite the fact that no outside period for vesting was set forth in the contract. Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980); Downtown Athletic Club v. Horman, 740 P.2d 275, 280 (Utah App. 1987). In both of these cases, it is clear that in the absence of a specified time period within which vesting will take place, Utah courts will imply a reasonable time period under the circumstances. Bradford v. Alvey, supra at 1252; Downtown Athletic Club, supra at 280, fn. 3. These are much more recent cases than Fisher v. Bailey, 14 Utah 2d 424, 385 P.2d 985 (1963) on which Russell has relied. As Russell points out, Justice Crockett, in his concurrence in Fisher, observed that when specification of a definite time for conveyance of lots is omitted:

> . . . the law will imply that it is to be done within some such reasonable time as it must sensibly be supposed was contemplated by the parties. What the *reasonable time is to be determined by looking at all of the facts and* circumstances. That is what should be done here. The instant situation does not appeal to me as being in any way related to the too-long-delayed vesting of estates in land which the rule against perpetuities is purposed to prevent.

Id. at 989. More than a decade and a half later, the Utah Supreme Court, in Bradford, completely ignored the rule against perpetuities in a real property transaction and instead settled

the issue by requiring the trial court to determine what constituted a reasonable time for performance under the circumstances. Similarly, the Utah Court of Appeals in Downtown Athletic Club, almost 25 years after Fisher, also disregarded the rule against perpetuities and instead utilized contract principles in construing a real property transaction. Thus, contrary to Russell's observation, Justice Crockett's concurring opinion in Fisher has "won the day."[5]

While the trial court erred in making a factual determination as to what constituted a reasonable time period within which Coulter & Smith could have exercised the option, if that time period is determined on remand to have been within the perpetuities period, then the Agreement, as a matter of law, could not violate the rule against perpetuities.

III. THE TRIAL COURT MUST TAKE EVIDENCE ON WHAT CONSTITUTES A "REASONABLE TIME" FOR EXERCISE OF THE OPTION.

In arguing that the Spring of 1992 was the outside period by which the option in the Agreement was to have been exercised, Russell misstates the facts. While he states that the "undisputed facts show that the parties *intended* Coulter to have completed development" by the Spring of 1992 (Russell Brief, p. 33), the record reveals a factual dispute over this issue. Coulter & Smith's evidence was that no promises were ever made about the Spring of 1992. (R. 219, ¶12). The parties knew that negotiations with adjacent landowners were delicate and

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[5] By its implied recognition that contract principles control real property transactions despite the rule against perpetuities, Utah joins not only California and North Carolina, (Rodin v. Merritt, 48 N.C.App. 64, 68; 268 S.E.2d 539, 542 (1980); Wong v. DiGrazia, 35 Cal. Rptr. 241, 247, 386 P.2d 817, 823 (1963)), but also Virginia, Ryland Group, Inc. v. Wills, 229 Va. 459, 331 S.E.2d 399 (1985), Georgia, Young v. Cass, 225 Ga. 508, 340 S.E.2d 185 (1986), Kansas, Singer Co. v. Makad, Inc., 213 Kan. 725, 518 P.2d 493 (1974), and Arizona, In Re Wonderfair Stores, Inc. of Arizona, 511 F.2d 1206 (9th Cir. 1985) (construing Arizona law). The Ninth Circuit characterizes the position Russell has taken as a "strict, outdated approach rejected by the majority of jurisdictions." Id. at 1213.

difficult. (R. 219, ¶12). The parties knew that annexation and zoning was required (R. 10, Agreement), and that neighborhood support for the access and zoning issues was necessary. (R 219, ¶10; R. 344, ¶10). They knew that the master drain system would require enlargement, and that excavation, grubbing, rough grade work, and installation of water, final site grading, streets, curbs, and sidewalks were required. (R. 52, Three Way Work Exchange Agreement). The most that can be implied from these facts is that the parties *hoped* the development would be complete by the Spring of 1992. In any event, this is a factual dispute not properly resolved on summary judgment.

The difficulties Coulter & Smith encountered makes it clear that the Spring of 1992 was *not* a reasonable time for the development to be completed and the option to be exercised. In fact, Russell's continued cooperation and acquiescence after Spring 1992, recognizing the development difficulties, implies that he himself knew that the circumstances were such that development would not be completed for some time, but that the parties were obligated under the Agreement to continue their efforts. But Russell has made himself judge and jury of what constituted a reasonable time period, taking the disputed position that the option was definitely to have been exercised by the Spring 1992, and then unilaterally repudiating the Agreement in November 1992 when he was approached with what he considered to be a better offer. The trial court apparently did not agree with Russell that the Spring of 1992 was a reasonable time within which the option should have been exercised, for its finding of fact on the issue was that January 1995 was the relevant date. (R. 454-55, ¶¶8-10). In making that improper finding, the trial court disregarded Coulter & Smith's evidence that Russell had refused to even discuss the project after November 1992. On summary judgment, Coulter & Smith was

entitled to all inferences to be drawn in its favor. Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989). What constitutes a reasonable time period for completion of the development and exercise of the option under the circumstances is the subject of a trial, not a summary judgment motion.[6] The trial court's factual finding on this issue must be reversed and the matter remanded for trial.

IV. THE AGREEMENT WAS SUPPORTED BY AMPLE CONSIDERATION.

In arguing that the Agreement was not supported by consideration, Russell has overlooked his own admissions that the Agreement memorialized Coulter & Smith's agreement to develop the 3.67-Acre Parcel into subdivision lots, as well as the option to purchase those lots once developed. (R. 70, ¶¶4-7). Prior to entering into the Agreement, Coulter & Smith had no obligation to attempt to solve Russell's development difficulties. Prior to the Agreement, Coulter & Smith had no obligation to take any steps at all toward developing the 3.67-Acre Parcel. Contrary to Russell's characterizations, the Agreement was not a simple option to purchase real property, but was an agreement for Coulter & Smith to develop the 3.67-Acre Parcel in exchange for the option to purchase the lots once developed. Thus, Russell is incorrect in asserting that Coulter & Smith's promises were "likely illusory and unenforceable by

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[6] Repeatedly focusing on the fact that more than five years have elapsed since the Agreement was signed without Coulter & Smith's exercise of the option (Russell Brief, pps. 20-21 and footnote 6, page 31, page 35 and footnote 13), Russell has overlooked the fact that he himself is one major cause of stagnation in the development. After unilaterally renouncing his obligations under the Agreement in November 1992, Russell has *refused to even discuss* development with Coulter & Smith, much less cooperate with Coulter & Smith in any of its efforts to complete the development. (R. 220, ¶17). While Russell points to the obstacles Coulter & Smith faces in developing the property (Russell Brief, pps. 20-21, footnote 6 and p. 35, footnote 13), he disregards the fact that many of these obstacles have long since been overcome. Since summary judgment was improperly entered, Coulter & Smith never had an opportunity to present that evidence to the trial court.

Russell." (Russell's Brief, p. 37). Coulter & Smith's promise to develop the 3.67-Acre Parcel and its concomitant expenditure of more than $35,000.00 specifically because of that promise, constituted ample consideration for the Agreement. 77 Am.Jur.2d Vendor and Purchaser §35 (1975); Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028, 1036 (Utah 1985) (promises made to perform an act that would be detrimental to the promisor or beneficial to the promisee may constitute the consideration for a contract).

Moreover, even if Coulter & Smith's promises to Russell were considered to be inadequate consideration, this is a factual issue requiring resolution by the trial court. Russell denies that Coulter & Smith's actions were of benefit to him. Coulter & Smith's evidence was directly to the contrary, evidencing substantial benefit to Russell. Russell argues that Coulter & Smith's acts were merely "beginning preparations" insufficient to support a claim of promissory estoppel. (Russell's Brief, pp. 37-38). But Russell's own authority, Knight v. Seattle First Nat'l Bank, 22 Wash. App. 493, 589 P.2d 1279, 1283 (1979) acknowledges that the distinction between what constitutes (1) beginning preparations for performance and (2) tender of part of actual performance is a factual one, and is not always clear:

> The distinction turns on many factors:
>
> > the extent to which the offeree's conduct is clearly referable to the offer, the definite and substantial character of that conduct, and the extent to which it is of actual or prospective benefit to the offeror rather than the offeree, as well as the terms of the communications between the parties, for their prior course of dealing, and any relevant usages of trade. Restatement (Second) of Contracts, §45 comment *f* (Tent. Draft No. 1, 1964).

Knight v. Seattle First Nat'l Bank, 589 P.2d at 1282. Thus, each situation must be examined on an individual factual basis.

Applying these factors to the case before this Court, Coulter & Smith's actions taken to develop the 3.67-Acre Parcel would never have been taken in the absence of the Agreement, thus they are clearly referable to the Agreement. By expending more than $35.000.00 of its own money in expanding the sewer and storm drainage system solely to accommodate the 3.67-Acre Parcel, Coulter & Smith's actions cannot be said to have been other than of a definite and substantial character. Russell himself has acknowledged that the expansion of the sewer and storm drainage system will eventually be of benefit to him when a sewer line is developed between the 3.67-Acre Parcel and the enlarged system Coulter & Smith installed. (R. 262, ¶6). Russell's acknowledgement is in accord with Coulter & Smith's testimony that Russell will be *required* by Sandy City to utilize the expanded sewer and storm drainage system. (R. 345-46, ¶13). Thus, Coulter & Smith's actions were of actual and/or prospective benefit to Russell. While Russell denies that he was benefitted, or that Coulter & Smith's actions were of any definite or substantial character, he is wrong. In any event, these are factual issues to be resolved by the trial court. At trial, Coulter & Smith is entitled to prove its part performance of its obligations under the terms of the Agreement, and is entitled to a ruling that its part-performance estops Russell from denying his obligations.[7]

Russell's argument that he is entitled to recession rests on his mischaracterization of the facts that the parties "intended" that all conditions to have been met by the Spring of 1992. As set forth above, there is a factual dispute as to whether the parties "intended" or only "hoped" that the development be completed by that time. As a matter of law, this dispute cannot be resolved on summary judgment. Rule 56, U.R.Civ.P. Moreover, rescission requires that the parties be placed in the position that they were in prior to the contract having been made. 50 W. Broadway v. Redevelopment Agency, 784 P.2d 1162, 1170 (Utah 1989). Rescission would require that Russell restore to Coulter & Smith all of the benefits Russell received and make Coulter & Smith whole for all of the detriment Coulter & Smith suffered. This raises a whole plethora of factual disputes that will require resolution by the trial court.

CONCLUSION

For the reasons set forth above, this court should reverse the trial court's grant of summary judgment and remand this case for further proceedings.

DATED this 22d day of April, 1996.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing document were sent by United States mail, postage fully prepaid, on this 22d day of April, 1996 to the following:

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